BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the original three-judge court is reported *sub nom. Dravo v. Fox,* in 16 F. Supp. 527. The opinion of this Honorable Court upon the earlier appeal is found at 302 U. S. 134. The opinion of the Circuit Court of Appeals (R. 223) is reported in 114 F. (2d) 242.

Jurisdiction.

The opinion of the Circuit Court of Appeals, reversing the District Court, was entered on September 6, 1940. By order dated December 4, 1940, the time for filing petition for certiorari was extended for a period of ten days from December 6, 1940 (R. 234). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 347).

Questions Presented.

I.

Whether the apportionment, directed by the Circuit Court of Appeals, of the income of petitioner, a foreign corporation, derived from the performance, partly within and partly without the State of West Virginia, of certain contracts with the United States for the construction of locks and dams in navigable rivers, by allocating as income taxable under the statute known as the West Virginia Gross Sales and Income Tax Law, all payments made under said contracts upon events occurring within West Virginia, without regard to the extent to which those payments were derived from or were attributable to activities carried on or engaged in beyond the borders of said state, follows and conforms to the applicable rulings of this Court upon the former appeal in this case.

II.

Whether any part of the tax assessed against petitioner can be sustained in as much as the taxable income of petitioner was not identified or ascertained and the statute involved provides no method of apportionment for the identification or ascertainment thereof.

The Record in the Circuit Court of Appeals.

Before proceeding with the statement of the case, we wish to direct the Court's attention to the situation in regard to the record in the Circuit Court of Appeals.

By stipulation of the parties, it was agreed that the record upon the appeal to the Circuit Court of Appeals should consist of the printed record upon the previous appeal to this Court, together with the depositions, stipulations, pleadings, orders, and various other papers filed in said case since the remand thereof by this Court. It was further stipulated that a Joint Supplement to Briefs, to be printed in said Circuit Court of Appeals, should contain only certain portions of the previous record in this Court and of the record that had subsequently been made, to which the parties desired particularly to direct the Circuit Court of Appeals' attention. References to the printed Joint Supplement in the Circuit Court of Appeals will be designated as "(R. ....)", and references to the former record in this Court will be designated as "(U. S. Sup. Ct. R. ....)".

Statement of the Case.

This is a suit in equity brought in the District Court of the United States for the Southern District of West Virginia by The Dravo Contracting Company as plaintiff, against respondent, as an individual and as State Tax Commissioner of the State of West Virginia for an injunction to restrain the collection of privilege taxes

assessed against your petitioner in the amount (including penalties) of $135,761.51.

The statute under which the assessment was made is known as the Gross Sales and Income Tax Law of the State of West Virginia. Code of West Virginia, 1931, Chapter 11, Article 13, amended effective May 27, 1933, Acts of 1933, Chapter 33 (U. S. Sup. Ct. R. 26). It provides for "annual privilege taxes" on account of "business and other activities", and imposes, upon every person engaged or continuing within said state in the business of contracting, a tax "equal to two per cent (2%) of the gross income of the business". (*id.*)

Your petitioner is a Pennsylvania corporation engaged in the general contracting business. Its principal office and plant are at Pittsburgh, Pennsylvania. It has been qualified to do business in West Virginia for many years (R. 84-85).

Petitioner's plant at Neville Island, Pittsburgh, Pennsylvania, consists of a machine shop, structural and pattern shops, and other facilities for shaping and fabricating steel and equipment of various kinds, as well as repair shops and a warehouse for storage (R. 84). Its main offices are also at Neville Island, Pittsburgh, Pennsylvania (*id.*), including its executive, engineering, drafting, estimating, purchasing, and accounting offices and the offices for the staffs of its various departments.

The income assessed for tax arose out of four contracts between the United States and your petitioner for the construction of roller gate dams and locks in the Kanawha River at Marmet and London, West Virginia, and for the construction of locks in the Kanawha River at Winfield, West Virginia, and in the Ohio River near Gallipolis, Ohio (R. 77 *et seq.*).

All four contracts were entered into by mail between petitioner at Pittsburgh, Pennsylvania, and the representatives of the United States Government at Huntington, West Virginia (R. 79). The Marmet and London

contracts covered the construction of roller gate dams, together with the alterations of or additions to existing locks, and machinery and equipment incidental thereto. Unlike the old stationary dams of solid masonry, roller gate dams consist of large cylindrical steel gates placed between piers or pillars of concrete and hoisted or lowered by machinery operated by electrical power, together with structural steel bridges extending clear across the river with two chords or decks upon which are operated large electrical cranes on tracks (general specifications of London contract, page 1, U. S. Sup. Ct., R. 98).

The following dimensions, prices, and quantities taken from the London contract convey the extent and size of the work involved. Each roller gate dam consisted of five cylindrical gates of steel each 100 feet long and 26 feet in diameter, unit price $66,000 each. The steel service bridge was 565 feet in length with two decks. The unit price of the electrical revolving locomotive crane was $25,000 and of the electric crane unit $7,500. The unit price of the power house machinery was $19,000, of the electric illumination and control equipment $19,800, of the four lock gate operating machines $3,500 each, and of the two gate valves $12,000 each (U. S. Supt. Ct. R. 101).

In the estimate for the London contract alone furnished by the Government, the following quantities of various materials were estimated as required: concrete, 73,300 cubic yards; structural steel, 1,824,000 pounds; reinforcing steel, 492,000 pounds; nickel steel, 368,600 pounds; steel castings, 398,400 pounds; sheet steel piling, 15,600 square feet; as well as substantial though lesser quantities of various other materials (U. S. Sup. Ct. R. 101).

The Winfield and Gallipolis contracts covered twin or parallel locks of the usual type found on inland rivers, together with four steel lock gates, eight lock gate oper-

ating machines with valves and piping for hydraulic operation, and necessary supply lines, as well as power-house machinery and electrical power distribution systems (general specifications, Winfield lock contract, page 1, record, page 573, not appearing in either printed record).

The twin locks at Winfield were 56 feet wide by 360 feet long, with four steel lock gates, unit price $26,000 each. The unit price of the power house machinery was $36,000, of the electric illumination and control equipment $11,000, of the eight gate valves $13,300 each, of the eight lock gate operating machines $4,200 each, and of the piping system $22,000 (*id.*).

In the Government's estimate for the Winfield contract alone, the following quantities of various materials were estimated as required: concrete, 128,400 cubic yards; structural steel, 871,000 pounds; reinforcing steel, 361,000 pounds; various iron and steel castings, 188,000 pounds; 3-inch and 4-inch fibre conduit, 12,800 linear feet, as well as substantial though lesser quantities of various other materials (*id.*).

Each contract required the plaintiff to furnish all labor and materials and to perform all work required for the work described in each contract "for the consideration of the sum based on designations and unit rates specified in the schedule appended" to each contract (U. S. Sup. Ct. R. 62). In other words, these contracts were unit price contracts. The items designated for unit price payments consisted generally of linear, square, cubic, and avoirdupois units of work, together with lump sums for certain units of machinery and equipment, such as roller gates and revolving electric locomotive cranes (see London bid, U. S. Sup. Ct. R. 393).

Each contract provided that partial payments would be made as the work progressed at the end of each calendar month on estimates made and approved by the contracting officer, London contract, Article 16, (U. S. Sup.

Ct. R. 69). In addition, the detailed specifications of each contract provided for the inclusion in the monthly estimates of various percentages of certain unit prices upon certain specified events. Refer Paragraph 4-47 in the detail specifications for the London contract covering measurement and payment for all metal work (U. S. Sup. Ct. R. 157-158).

The events upon which these additional payments were made were (1) purchase of material for fabrication; (2) the fabrication thereof; (3) delivery at the work site; and (4) incorporation in the structure. For example, under the specifications of the Marmet and London contracts, percentage payments of the unit prices for the various parts of the roller gates and appurtenant structures and equipment were provided for (2) upon fabrication; (3) upon delivery at the work site; and (4) upon erection (U. S. Supreme Court, R. page 222). Payments of specified percentages of the unit prices of other metal material were provided for upon (3) delivery at the work site, and (4) incorporation in the structure (*id.* p. 158). None of the contracts as originally drawn provided for any payments upon delivery of material at petitioner's plant. Such provision was made, however, by a change order under the Winfield contract to stimulate production so as to provide immediate employment for shop employees (U. S. Sup. Ct. R. 386 a). Under the Winfield contract as so changed, percentage payments on the unit price of lock gates and of the valves and machinery incidental thereto were made (1) upon delivery of material at the plant; (2) upon fabrication; and (3) upon incorporation in the structure. Similar provision was made in respect of various materials by a typewritten addition to the Gallipolis contract.

In view of the importance attaching to partial payments made (1) upon delivery of materials, and (2) upon fabrication, under the decision of the Circuit Court

of Appeals, we set forth below a list of all items under each of the four contracts in respect of the unit prices of which any such part payments were made, also indicating the percentage of the unit price so paid (see tables, R. 97-98):

	Payment upon Delivery of Materials	Payment upon Fabrication
Marmet Contract		
Roller gates and appurtenances	None	50%
London Contract		
Roller gates and appurtenances	None	50%
Winfield Contract		
Lock gates	30%	30%
Lock gate operating machines	30%	30%
Stoney gate valves	30%	30%
Gallipolis Contract		
Structural Steel and other metals	30%	30%
Tainter gate valves	30%	30%
Lock gate machinery	30%	30%

In respect of no other items were such part payments provided.

Tables of the various items under each of the contracts in respect of which part payments were made upon events other than upon delivery of material or fabrication are contained in the original stipulation (R. 99-100).

The partial payment provisions of the respective contracts, therefore, varied as to (1) the designated items for which they were provided; (2) the events upon which they were to be paid; and (3) the percentage of the unit price to be paid.

All payments under the several contracts were received by petitioner at its office in Pittsburgh, Pennsylvania. None was received by petitioner in West Virginia (R. 82).

The activities of petitioner in the performance of its contracts carried on outside the State of West Virginia are described in paragraph 11 of the original stipulation (R. 87 *et seq.*). They were classified by Mr. J. S. Miller, Vice President of The Dravo Contracting Company, in his deposition, as direct and indirect (R. 121). Fabrication, pattern making, preassembling, shop painting and transportation were classified as direct *(id.)*. These activities were described as direct because they could be charged directly to an item in the contract.

Indirect activities, as classified by Mr. Miller, included estimating and bidding (R. 119), engineering, drafting, purchasing, supervising, accounting, manufacturing of equipment, and renewing, repairing, handling, and warehousing of equipment, materials, and supplies, as well as accounting and printing (R. 121-122). The scope and extent of these indirect activities were described in the depositions of various officers of petitioner (R. 107 *et seq.*).

Respondent, as State Tax Commissioner, assessed petitioner's entire income from the work referred to with taxes in the sum of $135,761.51 (including penalties) for the years 1933 and 1934, as above stated, and demanded payment thereof.

As set forth in more detail in the Petition for Certiorari (*supra*, p. 1 *et seq.*), the collection of the entire tax was originally enjoined; upon appeal to this Court, that decree was reversed and the case was remanded with directions that an apportionment would in any event be necessary to limit the tax to the income from activities carried on in West Virginia; subsequently, by virtue of an apportionment on a cost ratio

basis, the petitioner's tax liability was fixed at $63,214.25 by the District Court (R. 49 *et seq.*); upon appeal to the Circuit Court of Appeals for the Fourth Circuit, that decree was also reversed, and the case was ordered remanded, with directions that the decree to be entered should enjoin the collection of only so much of the taxes in question as were assessed upon payments made upon delivery of materials and upon fabrication thereof at petitioner's plant outside West Virginia (R. 231-232). The resulting tax would amount to $108,814.67.

By order dated December 4, 1940, the time for filing petition for certiorari was extended for a period of ten days from December 6, 1940 (R. 234).

The petition, in support of which this brief is filed, prays that a writ of certiorari issue to review that decision of the Circuit Court of Appeals.

Specification of Errors to be Urged.

I.

The Circuit Court of Appeals erred in directing that an apportionment of petitioner's income should be made upon the basis of the place of occurrance of the activities upon which payments were made.

II.

The Circuit Court of Appeals erred in refusing to enjoin the collection of the entire tax.

Argument.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN DIRECTING THAT AN APPORTIONMENT OF PETITIONER'S INCOME SHOULD BE MADE UPON THE BASIS OF THE PLACE OF OCCURRENCE OF THE ACTIVITIES UPON WHICH PAYMENTS WERE MADE.

The first question presented is the validity of the Circuit Court of Appeals' apportionment of petitioner's receipts or gross income.

The Circuit Court of Appeals concluded as follows (R. 227):

> "With the exception of the deliveries and the fabrication at the Pittsburgh plant, for which partial payments were made, with passage of title to the Government, all of the activities upon which payments were made occurred within the state, and the income derived therefrom was subject to the state's power to tax."

The Circuit Court of Appeals accordingly directed that (R. 231-232)

> "* * * decree should be entered enjoining the collection of only so much of the taxes as were assessed upon the portion of the income of taxpayer derived from payments made upon deliveries or fabrication at its Pittsburgh plant * * *".

The decision of the Circuit Court of Appeals, therefore, holds taxable all petitioner's income derived from payments made *upon* events occurring in West Virginia and exempts only those payments made *upon* events

happening outside the state. The activities for which the payments were made and the place where they were carried on, are disregarded.

That decision is, we submit, in direct conflict with the decision of this Honorable Court upon the former appeal in this case, as well as other applicable decisions of this Court, in that said decision would subject to the tax work expressly held by this Court to be beyond the state's taxing jurisdiction.

Upon the former appeal in this case, *James v. The Dravo Contracting Company,* 302 U. S. 134, this Court, in the majority opinion delivered by Mr. Chief Justice Hughes, said (p. 135):

> "The questions presented are (1) whether the state had territorial jurisdiction to impose the tax * * *
>
> "*First*—as to territorial jurisdiction—Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the state had no jurisdiction to impose the tax. Hans Rees' Sons v. North Carolina, 283 U. S. 123, 133, 134; Shaffer v. Carter, 252 U. S. 37, 57; Surplus Trading Co. v. Cook, 281 U. S. 647."

That decision settles (1) that West Virginia's jurisdiction to impose the tax was governed by the place where the activities were carried on; and (2) by implication, that the state's jurisdiction to tax the gross income from activities was no greater that its jurisdiction to tax the activities from which said gross income was derived. In other words, in so far as the tax was imposed upon receipts in other states for work done in other states, it was conceded to be outside of the taxing power of the statute: *Ford Motor Co. v. Beauchamp,* 308 U. S. 331.

This Court, in its earlier opinion in this case, then proceeds (p. 135):

> "A large part of respondent's work was performed at its plant at Pittsburgh. The stipulation of facts shows that respondent purchased outside the State of West Virginia materials used in the manufacture of the roller gates, lock gates, cranes, substructure racks and spur rims, structural steel, patterns, and hoisting mechanism and equipment, under each of its contracts and fabricated the same at its Pittsburgh plant * * *."
>
> "It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania. As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the installation at the respective sites within that state and an apportionment would in any event be necessary to limit the tax accordingly. Hans Rees' Sons v. North Carolina, supra."

Here the Court again speaks in terms of "work" and "activities". The receipts or gross income therefrom unquestionably come under the same limitation. This Court has, therefore, expressly ruled in this very case that the work involved and the activities carried on outside West Virginia in fabricating the roller gates, lock gates, cranes, substructures, structural steel, patterns, and hoisting mechanism, and, consequently, the receipts or gross income derived therefrom, were beyond the state's taxing power. An apportionment was consequently held necessary.

The use of the word "accordingly" specified the kind of apportionment required. The kind of apportionment required was one that would limit the tax to the income

from activities at the dam sites and would exclude the income from activities carried on outside the state.

The apportionment adopted by the Circuit Court of Appeals, however, fails to limit the tax in accordance with the directions of this Court. It subjects to the tax the income, in some instances, the whole, in other instances, a part, derived from the very work expressly held exempt by this Court.

INCOME HELD EXEMPT BY THIS COURT, TAXED 100% BY THE DECISION OF THE CIRCUIT COURT OF APPEALS.

First, let us consider the items specifically mentioned as exempt in the opinion of this Court, the entire income from which would be subjected to the tax as a result of the decision of the Circuit Court of Appeals. Structural steel is a striking example of such an item. Structural steel was one of the items designated for unit price payments under all of the contracts. The unit price thereof covered not only the necessary material, but also all work required in the placing or installation thereof. See general specifications of the London contract (U. S. Supreme Court R. 158). Large quantities of this material were used in the performance of the contracts. The amount estimated as required for the London contract was 1,824,000 pounds (U. S. Sup. Ct. R. 101). Under three of the four contracts, no part payments were made either upon delivery or fabrication in respect of structural steel. See table of items in respect of which such part payments were made under the Marmet, London, and Winfield contracts (R. 97-98). It follows that, under the decision of the Circuit Court of Appeals, all income derived from the unit prices for structural steel under those three contracts would be subjected to the tax. Consequently the entire income

attributable to the purchase and fabrication of structural steel under those three contracts would be taxed under the decision of the Circuit Court of Appeals. The income attributable to the purchase and fabrication of structural steel was, however, upon the former appeal, by this Court held to be beyond the taxing power of the state. The conflict between the decision of the Circuit Court of Appeals and the former decision of this Court in respect of structural steel is manifest.

The same situation obtains in respect of lock gates and cranes under the Marmet and London contracts and in respect of patterns under the Marmet, London, and Winfield contracts. The tables above referred to show that no part payments were made upon delivery at plant or fabrication in respect of any of these further items specifically mentioned in this Court's opinion. The entire unit prices of these items, and consequently the entire income attributable to the fabrication thereof, would, therefore, be taxed under the Circuit Court's decision, in conflict with the express ruling of this Court.

INCOME HELD EXEMPT BY THIS COURT, PARTIALLY TAXED BY THE DECISION OF THE CIRCUIT COURT OF APPEALS.

Next, let us consider the items specifically mentioned in the opinion of this Court, a portion of the income from which is taxed under the decision of the Circuit Court of Appeals. In respect of those items part payments were made upon delivery at plant or upon fabrication. The part payments so made were excluded from taxable income by the decision of the Circuit Court of Appeals. In respect of this class of items, therefore, the entire income attributable to fabrication would not be subjected to the tax. The following facts contained in the record show, however, that a portion of that

income would be subjected to the tax, contrary to the earlier ruling of this Court.

First, let us consider roller gates and appurtenant structures under the Marmet and London contracts. The record discloses that at least 80% of said unit price of roller gates represented income attributable to exempt activities. Mr. J. S. Miller, Vice President of The Dravo Contracting Company and executive head of its contracting division, testified as follows (R. 125-127):

"Q. Mr. Miller, it has appeared that certain partial payments were provided for in the contracts, being based on a percentage of the particular unit price to which they were applicable, is that correct?

A. Yes.

* * * * * *

(R. 126)

"Q. Mr. Miller, what if any relation was there between these percentage part payments and the value of the article at the time of the event upon which the partial payment was dependent?

A. There was absolutely no relation between the partial payment and the actual value. The percentages were fixed arbitrarily. As a matter of fact, it was simply following a precedent established many, many years ago, when fabrication consisted of fabrication in small pieces. In those days the cost of erection in the field was very high compared with what it is today. Today in a modern shop we make this stuff in large pieces, as large as can be transported, and then in the field the erection is very simple.

Q. Mr. Miller, does the percentage payment provided for in respect of roller gates and in

respect of other metal materials in these contracts upon fabrication fairly represent the value of the article as fabricated or as delivered?

A. No, it does not. There they followed very closely the sixty-forty, and there again the roller gates must be pre-assembled here, prefitted, and it goes down in as big pieces as possible.

Q. Is the value greater or less than the percentage of the unit price prescribed upon fabrication or delivery?

A. The value is much greater than the sixty or sixty-five—Sixty per cent, is it?

Q. Yes, sir, sixty and sixty-five.

A. —allowed.

Q. How then does the final payment of thirty-five or forty per cent compare with the cost or value of erecting in the field?

A. Is it much greater than the cost of erection in the field; that is, the payment is much greater."

* * * * * *

(R. 127)

"Q. There is one more question in connection with the relationship between final part payments and cost of erection. What is the average cost of erection or installation at the work site of fabricated material?

A. I would say between fifteen and twenty per cent. It will vary in some items; it will vary with the items."

The testimony quoted establishes that the income attributable to installation activities would not exceed 20% of the unit price of the fabricated items. This testimony was unchallenged. It is corroborated by the stipulated facts. The activities in West Virginia consisted of the mere installation at the dam site. On the

other hand, the activities outside West Virginia in respect of fabricated items consisted of fabrication, pattern making, shop painting, storage and transportation, as well as estimating, designing, drafting, purchasing, supervising, accounting, etc. It follows that at least 80% of the unit prices of fabricated items is attributable to non-taxable activities carried on outside the state.

On the other hand only 50% of the unit price of roller gates was paid upon fabrication (R. 97). Therefore, only that percentage would be excluded from the income assessed for tax under the Circuit Court's decision. It is, therefore, indisputable that 30% of the income derived from the fabrication of roller gates would be subjected to the tax, in direct conflict with the former decision of this court.

All other work mentioned by the Supreme Court, in respect of which part payments were made upon delivery or fabrication, is in the same category as the roller gates. Such other work consists of lock gates under the Winfield contract only (see tabulation of items under that contract, R. 98); and structural steel under the Gallipolis contract (see similar tabulation, *id.*). The only difference is the size of the percentage of exempt work taxed. In connection with all such items other than roller gates, the payment made upon events occurring within West Virginia was 40%, instead of 50%, of the unit prices. Refer tables (R. 97-100) The testimony above referred to, showing that no more than 20% of the unit prices of fabricated items was attributable to West Virginia activities, applies equally to these other items. In respect of these items the decision of the Circuit Court of Appeals, therefore subjects to the tax, in conflict with this Court's decision, 20% of the unit prices of said items derived from out-of-state activities.

OTHER ITEMS IN ALL RESPECTS SIMILAR TO THE ITEMS HELD EXEMPT BY THIS COURT.

Thus far, we have considered only the particular items of work expressly referred to in the earlier opinion of this Court, namely, roller gates, lock gates, structural steel, etc. We believe, however, that the mention of those items by this Court was not intended as an exclusive classification. We believe that the items mentioned were mere examples of the work of fabrication. If that be correct, other items involving similar activities outside West Virginia are likewise beyond the state's taxing jurisdiction.

That there were many other such fabricated items in addition to those expressly mentioned in the opinion of this Court is indisputable. In respect of some, such as the various metal items under the Gallipolis contract (refer table R. 98), part payments were made upon delivery of materials and upon fabrication. In the case of those items, as in the case of items discussed above, upon which similar payments were made, the income from activities, held exempt by this Court, but subjected to the tax by the decision of the Circuit Court of Appeals, amounted to 20% of the unit price of the items.

In respect of other fabricated items, not mentioned by this Court, no part payments were made upon events occurring outside West Virginia. All fabricated items under the four contracts, other than those hereinbefore referred to, are included in this category. As in the case of similar items discussed above, at least 80% of the unit prices for this work was attributable to activities outside the taxing state. Yet because no payments were made in respect of the unit prices for this work upon events occurring outside West Virginia, the entire income derived from fabrication, amounting to at least 80% of the unit prices for the completed work, is held to be subject to the tax. A tabulation of items in this class, upon which

partial payments were made upon delivery at the work site under each of the contracts, appears in the original stipulation (R. 99-100). Examples of still another class of fabricated items, in respect of which no part payments whatsoever were made, are the Locomotive Cranes and Bridge Crane Units under the roller gate dam contracts (see items 33 and 34 of Appendix AA, R. 176). We submit that the tax upon other work similar in all respects to the work particularly mentioned by this Court in its opinion, is as much in conflict with that opinion as the tax upon the work expressly mentioned.

From the foregoing, it is clear that, as to all fabricated items under the four contracts in respect of which no part payments were made upon activities occurring outside West Virginia, the decision of the Circuit Court of Appeals taxes the income attributable to fabrication 100%, and that, as to the few items in respect of which such part payments were made, said decision taxes approximately 25% of the income attributable to fabrication activities (20% of the entire unit price of the work) notwithstanding the express ruling of this Court to the contrary.

The total amounts of petitioner's receipts thus subjected to the tax, contrary to the rulings of this Court, are not identified. The figures necessary for that purpose cannot be ascertained. If they could, it would be easy to apportion the tax in this case. Using, however, the average percentage figures arrived at as above set forth for the various classes of items, and using, in addition, the unit price figures contained in the part payment tabulations already referred to (R. 97-100), some approximation of the wrongfully taxed income for the particular items covered by the figures used, can be arrived at, as follows:

First classification—work for which part payments outside West Virginia were made (from tables, R. 97-98):

Contract	Item	Total Unit Prices	Per cent Wrongfully Taxed	Amount Wrongfully Taxed
Marmet	Roller gates, etc.	$291,920.00	30	$ 87,576.00
London	Roller gates, etc.	329,000.00	30	98,700.00
Winfield	Lock gates	244,000.00	20	48,800.00
Gallipolis	Various items	348,949.07	20	69,789.81
				$304,865.81

Second classification—work for which no part payments outside West Virginia were made (from tables, R. 99-100):

Contract	Item	Total Unit Prices	Per cent Wrongfully Taxed	Amount Wrongfully Taxed
Marmet	Various metals	$145,630.32	80	$116,504.26
London	Various metals and machinery	225,022.99	80	180,018.39
Winfield	Various metals and machinery	135,343.82	80	108,275.06
Gallipolis	Pipe, etc.	4,902.02	80	3,921.61
				$408,719.32

It thus appears that income amounting to a minimum of over $700,000, derived from exempt activities, is subjected to the tax by the decision of the Circuit Court of Appeals. And the figures mentioned are derived only from items in respect of which some kind of part payments were made. Only those items were covered by the tabulations in the record used in arriving at the above figures. The undisputed testimony was, however, that direct out-of-state activities entered into an almost equal number of items designated for unit price payments, in respect of which no part payments were made. Refer deposition of H. L. Hood (R. 172) and Appendix CC (R. 181) and Appendix AA (R. 176).

The percentage of the respective unit prices attributable to those out-of-state activities was not ascertained, and, therefore, does not appear. It is, consequently, impossible even to approximate their total.

Under the circumstances shown, we respectfully submit that the conflict between the decision of the Circuit Court of Appeals and the former opinion of this Court is not only probable, but actual and direct.

FAILURE OF THE CIRCUIT COURT OF APPEALS TO FOLLOW THE FORMER OPINION OF THIS COURT IN THIS CASE.

Moreover, the explanation of this conflict is evident when the basis of the Circuit Court's decision is considered. The following quotation appears to embody the conclusions controlling the Circuit Court of Appeals' decision (R. 227):

> "With the exception of the deliveries and the fabrication at the Pittsburgh plant, for which partial payments were made, with passage of title to the Government, all of the activities upon which payments were made occurred within the state, and the income derived therefrom was subject to the state's power to tax."

As we read the above language, it means that the fact that the payments were made *upon* activities carried on within the state subjects those payments to the state's taxing power, regardless of the extent to which they represent income derived from activities carried on beyond the borders of the state. In other words, according to the Circuit Court of Appeals, the controlling factor is the place where the event occurred *upon* which a payment is made.

The former opinion of this Court, however, lays down an entirely different rule. This Court said (*James v. Dravo,* 302 U. S. 134-135):

> "Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the state had no jurisdiction to impose the tax."

The principle stated has, moreover, been translated into terms of receipts as distinguished from activities, by this Court itself in the later case of *Ford Motor Co. v. Beauchamp,* 308 U. S. 331, 337, as follows:

> "James v. Dravo Contracting Company contains nothing contrary to this view. The statute under consideration there levied a 'privilege tax equal to two per cent of the gross income of the business'. Insofar as it was upon receipts in other states for work done in other states, it was conceded to be outside of the taxing power of the statute."

According to the decision of this Court, therefore, the controlling factor is the place where the activity was carried on *for* which the payment was made.

This Court directed, therefore, that any apportionment that might legally be made would have to limit the tax so as to exclude any tax upon income derived from activities carried on outside the State, whereas the decision of the Circuit Court of Appeals has adopted an entirely different limitation, namely, one in which the controlling factor is the place of the occurrence of the event upon which the payments were made. The taxation of much of Petitioner's income derived from out-of-state activities, in direct conflict with the earlier ruling of this Court, as previously shown, results from this failure of the Circuit Court of Appeals to abide by this Court's former opinion.

SOME OTHER IMPLICATIONS OF THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The decision of the Circuit Court of Appeals would, moreover, have some other very extraordinary implications. Assume, for example, that no payments had been provided for in any of the contracts, upon events occurring outside the taxing state. In that event, the entire income would have been taxable, although the activities from which it was derived, were carried on exactly as under the present contracts.

Or, on the other hand, let us assume that the entire income had been payable upon some event occurring outside the State. Would West Virginia agree, that, under those circumstances, no tax would be collectible?

Another peculiar result flowing from the decision of the Circuit Court of Appeals is the lack of uniformity that would obtain. Thus the income derived from the fabrication of structural steel under the Marmet, London and Winfield contracts would be taxed 100% because no partial payments were made upon events occurring outside the state, in respect of the unit prices of structural steel under those contracts. But payments of the kind in question were provided for and made in respect of structural steel under the Gallipolis contract. Exactly the same activities under the different contracts would, therefore, be taxed in a different measure under the rule established by the Circuit Court of Appeals.

Again, let us assume that the income from activities engaged in entirely outside West Virginia was ascertained and identified, yet was payable only upon the happening of a certain event within the state. No one would assert that such income was within the state's taxing power. We submit that the fact that the income

from those out-of state activities was not identified, cannot extend the taxing jurisdiction of the state beyond the limits that would otherwise prevail. On the contrary the fact that the income from those activities was not identified calls for some *method* of apportionment.

Finally, let us assume that the Legislature had contemplated that the business of contracting might be conducted partly within and partly without the state. Let us further assume that the Legislature had provided that, in such cases, the income of the business should be apportioned upon the basis adopted by Circuit Court of Appeals, namely upon the basis of the payments made upon events occurring within the state. It is clear that petitioner would have been entitled to show that that method of apportionment worked unfairly in petitioner's case: *Hans Rees' Sons v. North Carolina,* 283 U. S. 123.

As a matter of fact, something very similar to that occurred in this case. Upon the earlier remand of this case and prior to any further proceedings in the District Court, petitioner was apprised of respondent's contention that the partial payments in question formed a basis for apportionment. Petitioner accordingly took the depositions of its officers, hereinabove referred to, showing that such an apportionment does not work fairly in this case.

These illogical implications of the Circuit Court's decision strengthen the conclusion that the Circuit Court must have erred.

OTHER ERRORS IN THE OPINION OF THE CIRCUIT COURT OF APPEALS.

Exception is also taken to the conclusion of said Circuit Court of Appeals that this Court had heretofore "sustained the tax". The opinion of said court says (R. 227):

> "The fact that the Supreme Court sustained the tax, although the point was expressly raised in the record that it was invalid because imposed on income derived partly from out-of-state activities, with no provision for apportionment, is conclusive, we think, not only as to its validity, but also as to the fact that no such method of apportionment was contemplated."

On the contrary, we submit that this Court, in holding that an apportionment properly limiting the tax to taxable activities "would in any event be necessary", decided that no portion of the tax could be sustained as valid unless and until such an apportionment had lawfully been made.

Exception is also taken to the conclusion of the Circuit Court of Appeals that this Court "directed an apportionment" (R. 227). On the contrary, we submit that the question of whether an apportionment could be made was left to the lower court for decision in the further proceedings directed in the mandate of this Court.

Finally, the Circuit Court of Appeals say (R. 230):

> "* * * the power to tax income derived from contracting within the state is not affected by the fact that materials for use under the contract may be brought from without the state, or

that they may have been prepared by the contractor without the state for use under the contract. Only where income arising from a contract performed within the state accrues upon a separable out-of-state transaction should it be excluded, as not being income arising from contracting within the state."

The same idea is differently expressed in another part of the opinion ([redacted] A. R. [redacted]) : 229

> "The fact that the contractor may have prepared materials in other states for use in the contract is immaterial, if they were used in the performance of the contract in West Virginia and payments made the contractor were dependent upon such use."

This was substantially the argument of the present respondent upon his former appeal to this Court. In his original brief, the first and main question was stated as follows (see original brief on behalf of Fred L. Fox, Appellant, page 20) :

> "The contracts here involved clearly contemplate the local construction of locks and dams, and such work as may have been done outside of West Virginia in preparation therefor and such interstate transportation as may have occurred is purely incidental to said construction of the locks and dams."

The language of this Court overruling said contention is equally applicable to the above quoted language of the Circuit Court of Appeals (*James v. Dravo,* 302 U. S. 134, 135) :

> "Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the state had no jurisdiction to

impose the tax. Hans Rees' Sons v. North Carolina, 283 U. S. 123, 133, 134."

Equally applicable is the following language from the *Hans Rees* case referred to in the foregoing quotation: *Hans Rees' Sons v. North Carolina,* 283 U. S. 123, 133:

> "But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one State regardless of the extent to which it may be derived from the conduct of the enterprise in another State."

The conclusion of the Circuit Court of Appeals that the activities of petitioner in preparing materials in other states for use under the contracts, are immaterial, is, therefore, definitely in conflict with the decisions of this Court.

We, therefore, respectfully submit that the Circuit Court of Appeals erred in directing an apportionment based upon the place of occurrence of the activities upon which payments were made.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO ENJOIN THE COLLECTION OF THE ENTIRE TAX.

The second question presented is: Can any apportionment be made?

We assume, for the purpose of this discussion, that we have demonstrated that the apportionment of petitioner's income, directed by the Circuit Court of Appeals, and based on payments made upon delivery of material or upon fabrication at petitioner's Pittsburgh plant, cannot be sustained. We have shown that as to the particular items in respect of which such part payments were made, an apportionment of the final payment, made upon incorporation of the materials or equipment in the structure, would be necessary to limit the tax to income derived from activities in West Virginia (*supra,* p. 18 *et seq.*).

Moreover, an apportionment based upon all percentage payments made, including those made upon delivery at the work site, would be open to the same objection. All items in respect of which percentage payments were made were fabricated items (see table, R. 97-100), and according to the undisputed testimony, the income from fabrication represented at least 80% of the unit price of each item of that kind (*supra,* p. 23). On the other hand, the aggregate of all percentage payments, exclusive of the final payment, was 60% of the unit price of any item (65% in the case of roller gates only) (see tables, R. 97-100). It is therefore manifest that an apportionment would be necessary in respect of all final payments to limit the tax as directed.

Nor would an apportionment, excluding from taxation all unit prices in respect of which any part pay-

ments were made, limit the tax to income derived from activities in West Virginia, because there were many fabricated items in respect of which no part payments at all were made. Examples of such items are the locomotive cranes and bridge crane units used in the roller gate dams. In respect of these items no part payments whatsoever were made (see items 33 and 34 of Appendix AA, R. 176). Yet these cranes were specifically mentioned as exempt from the tax in the former opinion of this Court. In the same category were various other assemblies of machinery and equipment (see tables, R. 97-100). In fact, the testimony in this case is undisputed that fabrication and other direct activities outside West Virginia were involved in the very large majority of all items designated for unit price payments under the contracts. Appendix CC (R. 181); and depositions of H. L. Hood (R. 172).

Further, every unit price represented, in some measure, income from out-of-state activities. None of the items designated for unit price payments comprised work entirely within West Virginia. Indirect activities outside West Virginia, such as estimating, bidding, designing, drafting, supervising, purchasing, accounting, etc., were involved in every item designated for unit price payments. This resulted from the type of items designated. The instructions of the Invitation for Bids, therefore, provided (U. S. Sup. Ct. R. 80):

> "The unit price bid for each item must allow for all collateral or indirect cost connected with it."

These instructions were followed and the cost of all activities not directly attributable to an item were spread over all the items *pro rata*: deposition of J. S. Miller (R. 120). Mr. Miller therefore testified (R. 123):

"A. Payments for those activities were included in each and every one of the unit prices under which payments were made."

Inasmuch as income from activities outside the taxing state, was included in every unit price paid, an apportionment of every unit price paid would be necessary to limit the tax to income from activities within West Virginia. Petitioner's income is not capable, therefore, of a separation, division, or apportionment so as to reflect the income from activities within and without the state, respectively, or so as to limit the tax in the manner previously directed by this Court, unless some artificial or arbitrary method of apportionment is available.

No arbitrary or artificial method of apportionment is available, however, under the statute involved in this case. The Circuit Court of Appeals, after full consideration of this question, said (R. 227):

> "If, therefore, any such apportionment as was made by the court below were necessary to separate the portion of the income which the state has jurisdiction to tax from the remainder, the tax would unquestionably be void in its entirety."

We therefore respectfully submit that the Circuit Court of Appeals erred in refusing to enjoin the collection of the entire tax against petitioner.

CONCLUSION.

We submit in conclusion that the decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court and, if permitted to stand, will result in depriving your petitioner of its property without due process of law to such an extent as to call for the exercise of this Court's power of supervision.

Respectfully submitted,

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